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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. ~~4447~~ 80

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER ZENITH RADIO CORPORATION.

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OCTOBER TERM, 1969.

No. 1117

ZENITH RADIO CORPORATION, A CORPORATION,
Petitioner,

vs.

HAZELTINE RESEARCH, INC., A CORPORATION,
Respondent.

REPLY BRIEF OF PETITIONER ZENITH RADIO CORPORATION.

I.

CONTRARY TO THE COURT OF APPEALS' HOLDING AND HRI'S ASSERTIONS, THE RECORD SHOWS THAT THE DISTRICT COURT REJECTED THE ALLEGED DEFENSES OF RELEASE AND LIMITATIONS ON WAIVER GROUNDS.

At page 21 of its Brief in Opposition HRI asserts "[I]f the trial court had considered the defenses waived it would not have granted leave to file them over Zenith's objection." On the contrary, the District Court clearly held that HRI had shown no adequate grounds which would excuse the late pleading of these affirmative defenses and that he was only permitting them to be filed to preserve HRI's appeal record. This conclusively appears from the following chronology of events in the trial court:

(1) The motion to file the affirmative defenses of release and limitations was presented one year after the close of the proofs in the case, after proposed findings and post-trial briefs had been filed with the Court and after the District Court had announced its decision and entered its initial findings of fact and conclusions of law, but before entry of judgment (395 U. S. at 117, n. 13).

(2) The *only* ground claimed then or since for permitting these defenses to be raised out of time was that Zenith had allegedly changed its damage theory to the surprise and prejudice of HRI and that the defenses would have been pleaded had Zenith's theory of recovery been fairly disclosed (A. 2943). HRI counsel expressly disclaimed that he was seeking to amend and reopen the proofs on the basis of newly discovered evidence (Court of Appeals Appendix, A. 1947).

(3) The District Court rejected HRI's change of theory argument as sham, pointing out that the pleading allegations and pre-trial briefs made Zenith's theory plain to anyone able to "understand the English language" (Court of Appeals Appendix, A. 1865, 1878, 1934, 1949-50). The Court, in colloquy with HRI counsel stated: "You do agree that the statute of limitations can be waived? You agree to that, don't you?" (Court of Appeals Appendix, A. 2026).

(4) The District Court did, however, grant HRI's oral motion for leave to file the defenses of release and limitations "for the sake of the record" (A. 3036). In answer to Zenith's objection that the defenses were not timely filed and therefore waived, the District Court clearly indicated that the defenses would not be given retroactive effect and that he was only permitting the defenses to be filed so that HRI could protect its record on appeal. Thus he stated, "The record will show that leave is given to file them *at this time* [April 1, 1965], *after proofs have been*

closed and after findings have been made'' (A. 3037, 3038). The Court then proceeded to deny HRI's motion to withdraw the findings and reopen the proofs as to Canada (A. 3038, 3040, 3062). The Court said: "In regard to Canada, there will be no change [in the findings] as far as the Court is concerned" (A. 3037, 3038). Inasmuch as the motion to withdraw the findings as to Canada was based on the same spurious grounds assigned to excuse the late pleading of the affirmative defenses—namely, that Zenith had changed its theory of action—the denial of the motion necessarily was a rejection of these grounds and a holding that the defenses were belatedly raised and therefore waived.

Accordingly, before the Court of Appeals could treat the defenses of release and limitations as "in the case", it had to first hold that Zenith had in fact changed its theory of action and that the District Court abused its discretion in refusing to allow these defenses to be raised out of time. The court below avoids this determination by holding without record support that the District Court rejected them on their merits and not on waiver grounds, and that therefore the holding of the District Court could not be supported on the ground of waiver. This holding is directly contrary to the well established rule that the decision of the District Court can be affirmed on any ground shown in the record. See *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1938).

II.

SINCE THE ONLY DAMAGES CLAIMED AND ALLEGED WERE FOR THE FOUR-YEAR STATUTORY PERIOD, THE DEFENSE OF LIMITATIONS IS IRRELEVANT IN ANY EVENT.

At page 27 of its brief, HRI quotes this Court's opinion that "some part of the damages awarded therefore necessarily resulted from pre-damage period conduct" because

Zenith claimed and recovered damages on the theory that it would have had a larger percentage of the market than it actually had at the start of the damage period. Therefore HRI argues (and the Court of Appeals has held on remand) a portion of the recovery is barred by limitations. This is a non sequitur. As this Court pointed out, "Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim and the findings of the District Court expressly limited the damages awarded to those occurring 'during the 4-year statutory damage period.' " (395 U. S. at 117, n. 13). The statute of limitations only bars recovery of damages occurring before the four-year statutory cut-off date. It is immaterial whether the damages *incurred during* the four-year period are in part the result of past illegal conduct or the cumulative effects thereof. See *Hanover Shoe, Inc.* v. *United States Machinery Corp.*, 392 U. S. 481, 501, n. 15.

III.

THE DISTRICT COURT SPECIFICALLY FOUND THAT BUT FOR CONTINUATION OF THE ILLEGAL POOL ACTIVITY DURING THE DAMAGE PERIOD, ZENITH WOULD HAVE HAD THE MARKET PERCENTAGE CLAIMED, AND THIS COURT EXPRESSLY APPROVED THAT FINDING AND THE DAMAGE MEASURE EMPLOYED.

At page 31 of its brief, HRI states "*there were no findings* as to amount of damages based solely on damage period conduct, and the necessity for further hearings in the light of the affirmative defenses is clear." As we have pointed out, Zenith was not required to compartmentalize or segregate its damages as between those resulting from pre-damage period conduct and damage period conduct *where the damages claimed occurred and their impact was felt during the statutory damage period, and recovery was limited to the statutory period.* The only necessary finding

was that Zenith was damaged in the amount claimed during the damage period. Both Wright and Kaplan testified that Zenith would have had the same share of the Canadian market as it enjoyed in the comparable United States market during the same statutory damage period but for the repressive effects of the pool. This Court credited that testimony (as indeed did the Court of Appeals) and expressly approved the damage measure employed. Accordingly, there is no need for further hearings and findings as to the damage amount and the Court of Appeals remand order is clearly inconsistent with this Court's opinion and mandate.

IV.

IN ALL EVENTS ZENITH DID NOT WAIVE THE BENEFITS OF TOLLING AND THE COURT OF APPEALS HOLDING ON THIS ISSUE CAN ONLY BE SUSTAINED ON THE FURTHER GROUND THAT TOLLING ONLY APPLIES TO A PARTY DEFENDANT IN THE GOVERNMENT SUIT WHICH HOLDING CONFLICTS WITH THE DECISIONS OF THIS COURT.

The Court of Appeals held not only that HRI was entitled to the claimed damage reducing benefits of the "belatedly raised" limitations defense, but also that Zenith could not assert that the statute of limitations was tolled by the pendency of *United States* v. *General Electric, et al.* The effect of tolling would be to extend the permissible recovery period back to November, 1954. The court below based this holding on the dual grounds that (1) the issue of tolling was not before the court because Zenith did not plead tolling, and (2) that in any event under its earlier *Sun Theatre* decision (213 F. 2d 284, 292) tolling did not apply to a named co-conspirator, such as Hazeltine, but only applied to a party defendant in the government suit. HRI tacitly concedes the conflict and error in this holding,

but urges that it was *dictum* on the ground that Zenith did not raise tolling at the trial and that therefore the issue of tolling was not before the Court of Appeals (Brief in Opposition, p. 34). Obviously there was no reason for Zenith to plead tolling in the trial court, since its counterclaim only sought damages for, and recovery was limited to, the four-year statutory period, and since there was no issue raised as to limitations until *after* trial of the counterclaim. Only if the Court of Appeals subsequently held limitations to be in the case and a bar to recovery of damages incurred during the damage period but resulting from pre-damage period conduct—as it has now held—would tolling be relevant. Zenith pointed this out in its brief when the case was first before the Court of Appeals.

Moreover, under notice pleading requirements Zenith did not have to plead tolling in order to claim the benefits thereof. The statute of limitations is an affirmative defense and Zenith was under no duty to anticipate this defense and by way of avoidance allege that the statute was tolled during the pendency of the government suit. See *Hughes* v. *Roosevelt*, 107 F. 2d 901, 902; *Carroll* v. *Pittsburgh Steel Co.*, 103 F. Supp. 788, 789; *Alden-Rochelle, Inc.* v. *ASCAP*, 3 F. R. D. 157, 159. Nor was Zenith required to file a "reply" to the defense of limitations even if timely filed. See FRCP Rule 7. Section 5(b) of the Clayton Act expressly provides that the statute is tolled during the pendency of the government proceeding and this Court has held that a plaintiff is entitled to the benefits thereof upon showing that his action is based "in part on matters complained of in the government suit." *Leh* v. *General Petroleum Corp.*, 382 U. S. 54. Indeed, in *Leh*, tolling was not pleaded in the complaint and was raised for the first time after defendants had moved for summary judgment on the ground the action was barred by limitations.

CONCLUSION.

For the foregoing reasons, we respectfully urge that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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